

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

WHATCOM COUNTY ASSOCIATION OF  
REALTORS, BUILDING INDUSTRY  
ASSOCIATION OF WHATCOM COUNTY,  
WHATCOM AFFORDABLE HOUSING  
GROUP, SOUTH YEW STREET GROUP,  
CITIZENS' ALLIANCE FOR PROPERTY  
RIGHTS, AND WHATCOM BUSINESS  
ALLIANCE,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

And

CITY OF BELLINGHAM,

Intervenor.

**Case No. 16-2-0007**

**FINAL DECISION AND ORDER**

**SYNOPSIS**

Whatcom County Association of Realtors, Building Industry Association of Whatcom County, Whatcom Affordable Housing Group, South Yew Street Group, Citizens' Alliance for Property Rights, and Whatcom Business Alliance (Petitioners) *challenged Whatcom County (County) Ordinance No. 2016-034 amending the County's Comprehensive Plan (CP), alleging it was internally and externally inconsistent, failed to complete a housing demand analysis, relied upon a flawed land capacity analysis, and wrongly denied including*

1 *properties into the urban growth area. The Board found the Petitioners failed to carry their*  
2 *burden of proof to show the County's ordinance was clearly erroneous and closed the case.*

## 3 4 **I. INTRODUCTION**

5 The County adopted Ordinance No. 2016-034 to update its CP on August 9, 2016.  
6 Their work was done over several years and conducted jointly with cities located in  
7 Whatcom County. Interlocal agreements between the County and cities created a  
8 framework to coordinate their Growth Management Act (GMA) planning work. They jointly  
9 funded a report on future population and employment growth to assist the cities in  
10 presenting their growth allocation and urban growth area (UGA) proposals to the County.  
11 For the City of Bellingham (Bellingham), the County Council accepted Bellingham's  
12 preferred alternative population allocation from the Final Environmental Impact Statement  
13 (FEIS), but without a UGA boundary change. Following the County's CP adoption,  
14 Bellingham adopted its own CP update for the 20 year period between 2016 and 2036  
15 based on the same population growth allocation and the same UGA boundaries adopted by  
16 the County. Shortly thereafter, the City of Lynden (Lynden) City Council approved its 2016  
17 CP update for the same time period.<sup>1</sup>

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20 The Board held a Hearing on the Merits on March 8, 2017, at the Bellingham City  
21 Council chambers. The following parties were present: Petitioners were represented by  
22 Kristen Reid. Whatcom County was represented by Karen Frakes. Bellingham was  
23 represented by Alan Marriner. Board members present were Deb Eddy, Raymond Paoella,  
24 and Nina Carter as Presiding Officer. Procedural matters appear at Appendix A.  
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## 26 **II. BURDEN OF PROOF AND STANDARD OF REVIEW**

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28 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations,  
29 and amendments to them, are presumed valid upon adoption. This presumption creates a  
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<sup>1</sup> Respondent Whatcom County Prehearing Brief (February 1, 2017) at 4-6.

1 high threshold for challengers as the burden is on the petitioners to demonstrate that any  
2 action taken by the County is not in compliance with the GMA.

3 The Board is charged with adjudicating GMA compliance and, when necessary,  
4 invalidating noncompliant plans and development regulations.<sup>2</sup> The scope of the Board's  
5 review is limited to determining whether a County has achieved compliance with the GMA  
6 only with respect to those issues presented in a timely petition for review.<sup>3</sup> The GMA directs  
7 that the Board, after full consideration of the petition, shall determine whether there is  
8 compliance with the requirements of the GMA. The Board shall find compliance unless it  
9 determines that the County's action is clearly erroneous in view of the entire record before  
10 the Board and in light of the goals and requirements of the GMA.<sup>4</sup> In order to find the  
11 County's action clearly erroneous, the Board must be "left with the firm and definite  
12 conviction that a mistake has been made."<sup>5</sup>  
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### 15 III. BOARD JURISDICTION

16 The Board finds the Petition for Review was timely filed, pursuant to RCW  
17 36.70A.290 (2). The Board finds Petitioners have standing to appear before the Board,  
18 pursuant to RCW 36.70A.280(2)(a) and (b) and RCW 36.70A.210(6). The Board also finds it  
19 has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1)  
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### 22 IV. PRELIMINARY MATTERS

23 At the hearing on the merits, Petitioners objected to the County's proposed illustrative  
24 exhibits to be used during the hearing because they were untimely filed with the Board and  
25 parties. The County and Intervenor explained their exhibits were late by one day and this  
26 was "an honest mistake" in calculating the number of days allowed to submit illustrative  
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30 <sup>2</sup> RCW 36.70A.280, RCW 36.70A.302.

31 <sup>3</sup> RCW 36.70A.290(1).

32 <sup>4</sup> RCW 36.70A.320(3).

<sup>5</sup> *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

1 exhibits. They explained that all but two of the exhibits were already in the record.<sup>6</sup> The  
2 Board orally ruled to allow those County exhibits already part of the record to be used at the  
3 Hearing.<sup>7</sup>

4 The County and Bellingham objected to a 2016 slide from Petitioners' illustrative  
5 exhibits because census data on one slide were misleading and based on untimely census  
6 data.<sup>8</sup> The County moved to supplement the record with a slide showing data analyzed with  
7 updated census data.<sup>9</sup> The County further objected to a slide on page 9 of the Petitioners'  
8 illustrative exhibit because it was superseded by another map.<sup>10</sup> The Board finds the  
9 County and Petitioners' slides showing conflicting data are not allowed to supplement the  
10 record as they are untimely, were not part of the record during the County deliberations, and  
11 will not provide the Board with necessary information or be of substantial assistance in  
12 reaching its decision.<sup>11</sup>

## 13 14 15 **V. ANALYSIS AND DISCUSSION**

### 16 **ABANDONED ISSUES:**

17 At the outset, the Board clarifies that "Pursuant to WAC 242-03-590(1), failure of a  
18 party to brief an issue in the opening brief is deemed abandonment of that issue."<sup>12</sup> Further,  
19 the Board has held "[a]n issue is briefed when legal argument is provided; it is not sufficient  
20 for a petitioner to make conclusory statements, without explaining how, as the law applies to  
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26 <sup>6</sup> Hearing on the Merits Transcript (March 8, 2017) at 4-7.

27 <sup>7</sup> *Id.* at 5.

28 <sup>8</sup> *Id.* at 8.

29 <sup>9</sup> *Id.* at 9.

30 <sup>10</sup> *Id.* at 12.

31 <sup>11</sup> RCW 36.70A.290 Growth management hearings board—Petitions—Evidence.

32 (4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

<sup>12</sup> Second Prehearing Order (September 5, 2014) at 8.

1 the facts before the Board, a local government has failed to comply with the Act.”<sup>13</sup> In this  
2 case, Petitioners’ prehearing briefs make some conclusory statements or do not reference,  
3 with legal argument, specific statutes they allege in the issue statement to have been  
4 violated. For those issues statements where Petitioners did not provide specific legal  
5 argument, nor specify which statutes they claim are violated, the Board deems those issues  
6 abandoned. The alleged violation will not be considered. **Thus, the Board deems the**  
7 **issues or sub-issues alleging violations of the following statutes, presented in the**  
8 **Petition for Review but not briefed in Petitioners’ opening brief, to be abandoned:**<sup>14</sup>  
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11 Petitioners’ Issue Statement 2:

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- RCW 36.70A.020(3) and/or (12),
  - RCW 36.70A.100
  - RCW 36.70A.115
  - RCW 36.70A.130(3)(a) and/or (3)(b)

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17 Petitioners’ Issue Statements 3 and 5:

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- RCW 36.70A.020(1) through (4)
  - RCW 36.70A.080
  - RCW 36.70A.110
  - RCW 36.70A.115
  - RCW 36.70A.120
  - RCW 36.70A.130

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24 Petitioners’ Issue Statement 4:

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- RCW 36.70A.020
  - RCW 36.70A.110

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<sup>13</sup> *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB No. 96-3-0029 (FDO, January 8, 1997), at 7. See also *City of Bremerton v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c (FDO, August 9, 2004) at 5.

<sup>14</sup> See *North Clover Creek v. Pierce County* GMHB No. 10-3-0015 (FDO, May 18, 2011) at 11: An issue was abandoned when other than repeating these statutes in the statement of Legal Issue 3 petitioners have made no argument tied to these provisions. WAC 242-02-570(1) provides in part “Failure to brief an issue shall constitute abandonment of the unbriefed issue.” An issue is briefed when legal argument is provided. It is not enough to simply cite the statutory provision in the statement of the legal issue.

- RCW 36.70A.115
- RCW 36.70A.120
- RCW 36.70A.130

Petitioners' Issue Statement 6:

- RCW 36.70A.020
- RCW 36.70A.070
- RCW 36.70A.130

Petitioners' Issue Statement 7:

- RCW 36.70A.020

Petitioners' Issue Statement 8:

- RCW 36.70A.030
- RCW 36.70A.110
- RCW 36.70A.130

**ISSUES:**

**Issue 1:** Does the County's adoption of the Ordinance prior to cities within the County adopting their respective comprehensive plan updates violate RCW 36.70A.020(3), RCW 36.70A.100, RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), RCW 36.70A.210(1), and/or Whatcom County's County-Wide Planning Policies ("WCCWPP") C-3b, F-1, F-11, and/or F-12?

**Issue 2:** Do inconsistencies between the Comprehensive Plan (as adopted by the Ordinance) and the comprehensive plans of the City of Bellingham and City of Lynden, including the inconsistencies between the Bellingham Urban Fringe Subarea Plan, urban growth boundaries, capital facilities, the land capacity analysis, and the housing analysis (some of which are set forth in 3.6 below), violate RCW 36.70A.020(3) and/or (12), RCW 36.70A.100, RCW 36.70A.115, and/or RCW 36.70A.130(3)(a) and/or (3)(b), RCW 36.70A.210(1), and/or WCCWPP C-3b and/or F-11, F-12?

**Applicable Law:**

**RCW 36.70A.210 Countywide planning policies.**

(1) The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For the purposes of this section, a "countywide planning policy"

1 is a written policy statement or statements used solely for establishing a countywide  
2 framework from which county and city comprehensive plans are developed and  
3 adopted pursuant to this chapter. This framework shall ensure that city and county  
4 comprehensive plans are consistent as required in RCW 36.70A.100. Nothing in this  
5 section shall be construed to alter the land-use powers of cities.

6 **Positions of the Parties:**

7 Petitioners raise several topics in Issues 1 and 2 and most topics were deferred to  
8 subsequent issue statements. The main legal argument put forth by Petitioners for Issue 1  
9 and 2 is a question of timing. Petitioners claim the county and city plans must be  
10 coordinated and consistent and “[t]his requirement extends to countywide planning policies  
11 which are intended to be a framework for comprehensive plans per RCW 36.70A.210.”  
12 Petitioners argue the County’s plan was adopted before Bellingham’s plan and thus with  
13 different adoption dates, the County’s action “would effectively prohibit any party from ever  
14 appealing the county’s comprehensive plan on the basis of issues (consistency or  
15 otherwise) with the cities’ recommendations/plans.” Petitioners maintain they would be  
16 prohibited from filing a petition for review against the county as it would be untimely per  
17 WAC 242-03-220.<sup>15</sup> For Issue 2, Petitioners make the same timing and inconsistency  
18 argument that “GMA requires the [County’s] Comp Plan to be consistent with the *entire*  
19 comprehensive plan of both the City of Bellingham and the City of Lynden. Whatcom  
20 County has failed to comply with these GMA requirements...At the time the Comp Plan was  
21 adopted, the City of Bellingham and City of Lynden had not updated their comprehensive  
22 plans.”<sup>16</sup>

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25 The County responds to Issue 1 by explaining it would have violated the GMA  
26 adoption schedule required in RCW 36.70A.130(5)(b) by seven months had it waited for the  
27 cities within its borders to adopt their updates. Then the County could have been subject to  
28 a failure to act claim had it not adopted its own CP on time. The County replies that  
29 Petitioners cite no GMA or Countywide Planning Policies (CPPS) authority requiring the  
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31 <sup>15</sup> Petitioners’ Prehearing Brief (January 11, 2017) at 6.

32 <sup>16</sup> *Id.* at 8.

1 County to wait for the cities.<sup>17</sup> As to Issue 2 regarding coordination with the cities, the  
2 County explained that since 2012 the County worked with the cities, through inter-local  
3 agreements, continual interaction and coordination and a jointly funded study to assist in  
4 establishing population allocations.<sup>18</sup> Through these agreements, the County and cities  
5 settled on preliminary growth allocations, to use the same Land Capacity Analysis (LCA)  
6 methodology and this “led to the cities presenting recommendations on UGA boundaries to  
7 both the County Planning Commission and Council prior to the County adopting the final  
8 ordinance.”<sup>19</sup> The County emphasizes “it is the County, not the cities, that is responsible for  
9 establishing UGA boundaries. While cities can make recommendations, they have no  
10 authority to set the UGA.”<sup>20</sup> The County concludes Petitioners allegations about the County,  
11 Bellingham and Lynden CPs “fail to point to a single inconsistency between the plans to  
12 support this allegation, and thus they have not met their burden to establish this claim.”<sup>21</sup>

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15 Petitioners reply to the County arguments by stating the issue of Board jurisdiction  
16 over CPPS has been settled in *King County v. Central Puget Sound Growth Management*  
17 *Hearings Board*, 138 Wn.2d 161, 979 P.2d 374 (1999) which states “local governments are  
18 required to adopt regionally developed CPPs, **from which local comprehensive plans,**  
19 **and then development regulations, are enacted.**” (*Emphasis added.*) *Id.* at 176.  
20 Petitioners argue to the “extent the Countywide Planning Policies in this case correctly state  
21 the Growth Management Act (“GMA”) requirements, then Whatcom County is in violation of  
22 not only the GMA, but also the Countywide Planning Policies.”<sup>22</sup>

## 23 24 25 **Issue 1 and 2 Board Analysis:**

26 Petitioners allege a violation of RCW 36.70A.210 which requires a county, in  
27 cooperation with cities located in that county, to adopt a framework of CPPs that ensure city

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29 <sup>17</sup> Respondent Whatcom County and Intervenor City of Bellingham Prehearing Brief (February 1, 2017) at 10.

30 <sup>18</sup> *Id.* at 10.

31 <sup>19</sup> *Id.* at 10-11.

32 <sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11.

<sup>22</sup> Petitioner’s Reply Brief at 2.



1 and county comprehensive plans are consistent as required in RCW 36.70A.100.  
2 Petitioners further allege that “the County has failed to demonstrate their compliance with  
3 the coordination and consistency requirements contained in the GMA particularly because  
4 the County unilaterally adopted the CP prior to the City of Bellingham and City of Lynden’s  
5 adoption of their comprehensive plans.” But the County has no burden to “demonstrate  
6 their compliance” -- the burden of proof is clearly on the Petitioners to show noncompliance  
7 with coordination and consistency requirements in the GMA.  
8

9 Moreover, Petitioners have failed to cite any GMA provision precluding the County’s  
10 adoption of the CP prior to Bellingham’s and Lynden’s adoption of their comprehensive  
11 plans. Beyond generalized assertions of lack of coordination, Petitioners do not point to any  
12 specific evidence showing a lack of coordination between the County and the Cities that  
13 would be clearly erroneous under the GMA.  
14

15 Petitioners assert that the urban growth boundaries of Bellingham are inconsistent  
16 with the Bellingham Urban Fringe Subarea Plan (UFS Plan) but Petitioners also state that  
17 neither the UGA boundaries nor the UFS Plan has been changed for some years.<sup>23</sup> Since  
18 the GMA requires challenges to county legislative actions must be filed within 60 days of the  
19 ordinance publication date, Petitioners cannot raise inconsistency challenges to the  
20 Bellingham UGA boundaries years after the enactment of those boundaries. In the present  
21 case, Petitioners are strictly limited to challenging the text or maps adopted by County  
22 Ordinance 2016-034.<sup>24</sup>  
23

24 Finally, as to other alleged inconsistencies between County and City comprehensive  
25 plans or CPPs, Petitioners failed to adduce any specific evidence of external or internal  
26 inconsistencies created by the passage of challenged County Ordinance 2016-034.  
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29 <sup>23</sup> Petitioners’ Prehearing Brief (January 11, 2017) at 7.

30 <sup>24</sup> The Board is charged with determining only petitions alleging that a state agency, county or city is not in  
31 compliance with the requirements of the act as set out in a detailed statement of issues presented for  
32 resolution. The Board is barred from issuing “advisory opinions on issues not presented to the board in the  
statement of issues, as modified by any prehearing order.” RCW 36.70A.280(1), RCW 36.70A.290(1).

1           **Under Issues 1 and 2, the Board finds and concludes that Petitioners failed to**  
2 **satisfy their burden of proof to demonstrate that Ordinance 2016-034 is clearly**  
3 **erroneous.**

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5 **Issue 3:** Does the internal inconsistency between land use plans and capital facilities  
6 plans, including the Bellingham Urban Fringe Subarea Plan, the Birch Bay Community Plan,  
7 and the Foothills Subarea Plan, within the Comprehensive Plan, inadequate capital facilities  
8 planning, including comprehensive water, sewer, storm drainage, and transportation plans,  
9 and a lack of level of service standards, violate RCW 36.70A.020(12), RCW 36.70A.070(1),  
10 (2), and/or (3), RCW 36.70A.110, RCW 36.70A.115, RCW 36.70A.120, RCW  
11 36.70A.130(3)(a) and/or (3)(b), and/or WCCWPP C-2, C-3b, C-4, C-5, E-4, F-12, G-1  
12 through G-4, G-6, and/or G-7?

13 **Issue 5:** Does the failure to update subarea plans (i.e., the Bellingham Urban Fringe  
14 Subarea Plan, Birch Bay Community Plan, and the Foothills Subarea Plans) within the  
15 Comprehensive Plan and/or make subarea plans consistent with the Comprehensive Plan  
16 violate RCW 36.70A.020(1) through (4), and/or (12), RCW 36.70A.070(1), (2), and/or (3),  
17 RCW 36.70A.080(2), RCW 36.70A.110, RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or  
18 (3)(b), and/or WCCWPP C-2, C-3b, C-4, C-5, F-3, F-4, F-11, F-12, G-1 through G-4, G-6,  
19 and/or G-7?

20           In their Prehearing Brief (page 9), Petitioners allege for the first time a violation of  
21 RCW 36.70A.210 relating to CPPs. However, the Board cannot consider any legal  
22 argument relating to RCW 36.70A.210 because Petitioners did not raise RCW 36.70A.210  
23 in their issue statements for Issues 3 and 5.<sup>25</sup> Thus, the legal arguments related to RCW  
24 36.70A.210 fall outside the scope of review for Issues 3 and 5.

25 **Applicable Laws:**

26           **RCW 36.70A.020 Planning goals.** (12) Public facilities and services. Ensure that  
27 those public facilities and services necessary to support development shall be  
28 adequate to serve the development at the time the development is available for  
29 occupancy and use without decreasing current service levels below locally  
30 established minimum standards.

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32 <sup>25</sup> RCW 36.70A.280(1), RCW 36.70A.290.

**RCW 36.70A.070 Comprehensive plans—Mandatory elements.**

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

**Positions of the Parties:**

Petitioners' Prehearing Brief on page 8, footnote 29 states "for purposes of efficiency and economy, Issues 3 and 5 will be analyzed together."<sup>26</sup> Petitioners did not abandon Issue 5 and it is considered with Issue 3. For both Issue 3 and 5, Petitioners claim the County violated the internal consistency requirements in RCW 36.70A.070 because

The Bellingham Urban Fringe Subarea Plan ("UFS") references several areas within the Bellingham UGA which is entirely inconsistent with the Comp Plan.<sup>27</sup> Additionally, the zoning within these areas are in direct conflict with the Comp Plan as well.<sup>28</sup> These inconsistencies are well-documented.<sup>29</sup>... the zoning within these areas are in direct conflict with the Comp Plan as well.<sup>30</sup>

Petitioners anticipated the County response that County Policy 2L-2 resolves inconsistencies by clarifying that the County's CP policies govern if there are inconsistencies. Petitioners argue this Policy contradicts case law in *HEAL V. CPSGMHB* which states that when reviewing statutes, "[c]ourts must read legislation to give effect to every provision and avoid rendering certain passages superfluous or absurd."<sup>31</sup>

Petitioners also claim the County fails to comply with GMA Goal 12 in RCW 36.70A.020(12) regarding level of service requirements because "Without a level of service standard, a jurisdiction is unable to identify in its [Capital Facilities Element] which public

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<sup>26</sup> Petitioners' Prehearing Brief at 8.

<sup>27</sup> Index RES 010, Urban Fringe Subarea Plan, p. 26-42 compared to Comp Plan, Chapter 2 Maps (Attached as Exhibit 4).

<sup>28</sup> *Id.*

<sup>29</sup> Petitioner's Prehearing Brief at 8, 9-10. See also Index # RES010, Urban Fringe Subarea Plan, p. 26-42 compared to Comp Plan, Chapter 2 Maps (Attached to brief as Exhibit 4).

<sup>30</sup> *Id.* at 9.

<sup>31</sup> *HEAL v. CPSGMHB*, 96 Wn. App. 522, 528, 979 P.2d 864 (1999).

1 facilities and services it has deemed necessary to support development [and] are  
2 adequate.”<sup>32</sup> Petitioners cite that only two of nine capital facility categories have been  
3 assigned level of service standards and “[f]or the rest, there are merely vague statements  
4 referencing back to policy statements in the Comp Plan.”<sup>33</sup> Lastly, Petitioners argue the  
5 Birch Bay Community Plan’s housing projections “calls for one unit of resort housing for the  
6 tourist trade for each unit of housing,”<sup>34</sup> whereas the County’s CP “plans for five to ten units  
7 per net acre.”<sup>35</sup> Petitioners argue the CP fails to describe “housing types, styles, or uses”  
8 creating a CP internal inconsistency.<sup>36</sup>

9  
10 In response, the County explains “[i]t is true that there are different UGA boundaries  
11 in the CP than in the UFS, but the suggestion that there is an inconsistency because “the  
12 zoning within these areas are in direct conflict with the Comp Plan as well” ignores the  
13 reality that the County CP does not include a zoning district map.”<sup>37</sup> The County clarifies  
14 that any inconsistencies between its CP and subarea plans were corrected in 2009 when  
15 “the County’s CP was amended to specifically remedy the recurring potential for  
16 inconsistencies between the subarea plans and the CP...[t]he final sentence in Policy 2L-2  
17 provides that, “In the event there is an inconsistency between a Subarea Plan and the  
18 Whatcom County Comprehensive Plan, the Whatcom County Comprehensive Plan shall  
19 prevail.”<sup>38</sup> The County cites previous GMHB cases in Whatcom County addressing this  
20 same claim of inconsistency between subarea plans and the CP.<sup>39</sup>  
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24 <sup>32</sup> *Id.* at 10. See also Order on Motion for Reconsideration and Clarification (June 25, 2008) p. 8 (citing  
Fallgatter v. City of Sultan, CPSGMHB No. 07-3-0017 (FDO, September 5, 2007)).

25 <sup>33</sup> *Id.* at 11.

26 <sup>34</sup> *Id.* Index # CC-1144.

27 <sup>35</sup> *Id.* Exhibit 1, Comp Plan (Exhibit A, Chapter 2) Goal 2P: “Birch Bay – five to ten units per net acre.”

28 <sup>36</sup> *Id.*

29 <sup>37</sup> County’s prehearing Brief at 14.

30 <sup>38</sup> *Id.* at 14 and Ex. CC-1830, pp. 2-17 – 18.

31 <sup>39</sup> *Id.* at 15 “In *Governor’s Point, et al. v. Whatcom County*, GMHB No. 11-2-0010c (FDO, January 9, 2012), at  
169, the Board rejected a similar allegation of a conflict between a subarea plan and the CP, stating that,  
32 “Policy 2L-2 addresses how potential conflicts between the Comprehensive Plan and subarea plans are to be  
addressed – the Comprehensive Plan controls.” Recently, in *Yew Street Associates, et al. v. Whatcom  
County*, GMHB No. 10-2-0009c (Order on Dispositive Motion, October 21, 2016) at 12, the Board again held  
that Policy 2L-2 resolves any alleged inconsistency between the CP and the various subarea plans.”

1           Regarding claims about levels of service (LOS) standards, the County argues  
2 Petitioners over-state GMA LOS requirements. The County cites RCW 36.70A.020(12) as  
3 GMA's concurrency goal<sup>40</sup> and argues "[u]nder the GMA, the only public facilities and  
4 services that are required to have LOS standards are those that the County has deemed  
5 necessary for development." Next, the County refers to the Supreme Court's concurrency  
6 discussion in which it defined "'Concurrency' is the concept that an adequate level of service  
7 should 'be available concurrently with the impacts of the development or within a  
8 reasonable time thereafter.' . . . By enacting WCC 20.80.212, the County has plainly  
9 decided to require concurrency for, among other public facilities and services, fire  
10 protection."<sup>41</sup> The County lists the LOS standards for water, fire, sewage, schools which  
11 they have "deemed necessary for development"<sup>42</sup> and for those level of services not  
12 specifically identified, the County cites WAC 365-196-840(2)(b)(ii)(C) allowing jurisdictions  
13 to set LOS for other services.<sup>43</sup>  
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### 16 **Issues 3 and 5 Board Analysis:**

17           The Department of Commerce's guidelines at WAC 365-106-210(7) define  
18 consistency as meaning "that no feature of a plan or regulation is incompatible with any  
19 other feature of a plan or regulation. Consistency is indicative of a capacity for orderly  
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25 <sup>40</sup> RCW 36.70A.020(12) Ensure that those public facilities and services necessary for development shall be  
26 adequate to serve the development at the time the development is available for occupancy and use without  
27 decreasing current service levels below locally established minimum standards.

28 <sup>41</sup> Whatcom County Prehearing Brief at 17 and *Whatcom County Fire District No. 21 v. Whatcom County*, 171  
29 Wn.2d 421, 428, 256 P.2d 295 (2011).

30 <sup>42</sup> *Id.* at 18.

31 <sup>43</sup> *Id.* WAC 365-196-840(2)(b)(ii)(C) provides that: Counties and cities may identify any other improvements  
32 desired to raise levels of services above locally adopted minimum standards, to enhance quality of life in the  
community or meet other community needs not related to growth such as administrative offices, courts or jail  
facilities. Counties and cities are not required to set level of service standards for facilities that are not  
necessary for development, the failure to fund these facilities as planned would not require a reassessment of  
the land use element if funding falls short as required by RCW 36.70.070(3)(e).

1 integration or operation with other elements in a system....Consistency means that  
2 provisions are compatible, that one policy does not thwart another.”<sup>44</sup>

3       Petitioners generally allege inconsistencies between the Bellingham UFS Plan and  
4 the County CP, but Petitioners failed to provide any specific evidence or facts to support  
5 their legal argument. Petitioners also allege inconsistencies between “the zoning within  
6 these areas” and the CP, but Petitioners again failed to provide any specific evidence or  
7 facts to support their legal argument beyond the statement that “[t]hese inconsistencies are  
8 well documented.” As noted previously, under RCW 36.70A.280(1), RCW 36.70A.290(1),  
9 Petitioners are strictly limited to challenging the text or maps adopted by County **Ordinance**  
10 **2016-034**. Here, Petitioners failed to provide any evidence of inconsistencies created by  
11 **Ordinance 2016-034**.  
12

13       Finally, Petitioners allege the County’s failure to adopt level of service standards for  
14 the Sheriff’s Office and Adult Corrections violates the capital facilities planning goal in RCW  
15 36.70A.020(12). That planning goal must be used exclusively to guide development of  
16 comprehensive plans and development regulations. The planning goal does not require the  
17 County to adopt level of service standards for the Sheriff’s Office and Adult Corrections.  
18 Petitioners failed to satisfy their burden of proof to show that the capital facilities goal 12 did  
19 not guide the development of the CP and development regulation update.  
20

21       **Under Issues 3 and 5, the Board finds and concludes that Petitioners failed to**  
22 **satisfy their burden of proof to demonstrate that Ordinance 2016-034 is clearly**  
23 **erroneous.**  
24  
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30 <sup>44</sup> 123 Wn. App. 161, 167; see *City of Shoreline v Snohomish County*, Coordinated Cases 09-3-0012c and 10-  
31 3-0011c (FDO, May 17, 2011), at 13: County’s designation of an urban center that would cause adjacent city’s  
32 transportation and capital facilities plans to be out of compliance with GMA violated the inter-jurisdictional  
consistency requirement of RCW 36.70A.110.

1 **Issue 4:** Does the County's failure to prepare a complete housing demand analysis for its  
2 Comprehensive Plan update process violate RCW 36.70A.020(1), (2), and/or (4), RCW  
3 36.70A.070(1), (2), and/or (3), RCW 36.70A.110, RCW 36.70A.115, RCW 36.70A.120,  
4 RCW 36.70A.130(3)(a) and/or (3)(b), and/or WCCWPP C-3b, C-4, C-5, G-1 through G-4, G-  
5 6, and/or G-7?

6 **Applicable Laws:**

7 **RCW 36.70A.070 Comprehensive plans—Mandatory elements.**

8 The comprehensive plan of a county or city that is required or chooses to plan under  
9 RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering  
10 objectives, principles, and standards used to develop the comprehensive plan. The  
11 plan shall be an internally consistent document and all elements shall be consistent  
12 with the future land use map. A comprehensive plan shall be adopted and amended  
13 with public participation as provided in RCW 36.70A.140. Each comprehensive plan  
14 shall include a plan, scheme, or design for each of the following: . . .

15 (2) **A housing element** ensuring the vitality and character of established residential  
16 neighborhoods that: (a) Includes an inventory and analysis of existing and projected  
17 housing needs that identifies the number of housing units necessary to manage  
18 projected growth; (b) includes a statement of goals, policies, objectives, and  
19 mandatory provisions for the preservation, improvement, and development of  
20 housing, including single-family residences; (c) identifies sufficient land for housing,  
21 including, but not limited to, government-assisted housing, housing for low-income  
22 families, manufactured housing, multifamily housing, and group homes and foster  
23 care facilities; and (d) makes adequate provisions for existing and projected needs of  
24 all economic segments of the community.

25 **Positions of the Parties:**

26 Petitioners claim the County failed to incorporate current housing needs into the  
27 LCA and thus argues the County violated RCW 36.70A.070.<sup>45</sup>

28 "...the County has failed to incorporate the current housing needs into the  
29 LCA in violation of the plan [sic] language of **RCW 36.70A.070** which requires

30 <sup>45</sup> *Id.* at 12 "...the County has largely ignored data submitted during the comprehensive plan update process  
31 regarding current employment projections, housing demands, and the City of Bellingham housing crisis. (FN  
32 47 and 48 Compare Index # RES005, p. 61 "Employment capacity is 4,865 new jobs." To Index # LCA007, p.  
33 2 "Employment growth capacity and allocations" for Bellingham: 4,035. Index # CC-38, CC-171, CC-96, CC-  
34 415, CC-428, CC-1098, CC-1139, CC-1131, CC-1132, CC-1134, CC-1153, CC-1154, CC-1145, CC-1149,  
35 CC-1152, CC-1141, CC-1143, CC-1144, CC-1142, CC-1147, CC-1814, CC-1155. See also RES008,  
36 "...single-family housing crisis..."

1        “[a] housing element ensuring the vitality and character of established  
2        neighborhoods that: (a) Includes an inventory and analysis of **existing** and  
3        projected housing needs.”

4        Petitioners complain “the County has largely ignored data submitted during the  
5        comprehensive plan update process regarding current employment projections,<sup>46</sup> housing  
6        demands, and the City of Bellingham housing crisis.”<sup>47</sup> Petitioners conclude this failure led  
7        to “inaccurate and misleading projections regarding housing needs in the future which  
8        affects the calculation of land capacity needed in the urban growth areas.”<sup>48</sup>

9        In response, the County asserts there “is no requirement to perform the type of  
10       detailed economic study [Petitioners] dub a “housing demand analysis” as a part of the  
11       LCA.”<sup>49</sup> The County responds that “the GMA does not prescribe any particular  
12       requirements for a land capacity analysis. The GMA does not use the term and only alludes  
13       to the concept indirectly. Rather, the GMA’s focus is a mandate to the counties to designate  
14       UGAs “based upon” OFM population projections.<sup>50</sup> The County explains it completed a  
15       Housing Element in CP Chapter 3 and “did in fact perform a housing analysis. As a part of  
16       that analysis, the County verified that the planned capacity of single and multi-family  
17       housing in the UGAs was consistent with anticipated housing need.”<sup>51</sup> The County notes  
18       that cities are required to recommend UGA boundaries and make policy choices about  
19       infilling; during this process, they consider apartment vacancy.<sup>52</sup> In conclusion, the County  
20       argues Petitioners did not cite “any authority for their contention that the LCA must contain a  
21  
22  
23

24  
25       <sup>46</sup> Petitioner’s Prehearing Brief at 12. Compare Index # RES005, p. 61 “Employment capacity is 4,865 new  
26       jobs.” To Index # LCA007, p. 2 “Employment growth capacity and allocations” for Bellingham: 4,035.

27       <sup>47</sup> Index # CC-38, CC-171, CC-96, CC-415, CC-428, CC-1098, CC-1139, CC-1131, CC-1132, CC-1134, CC-  
28       1153, CC-1154, CC-1145, CC-1149, CC-1152, CC-1141, CC-1143, CC-1144, CC-1142, CC-1147, CC-1814,  
29       CC-1155. See also RES008, “...single-family housing crisis...”

30       <sup>48</sup> Petitioners’ Prehearing Brief at 13.

31       <sup>49</sup> County’s Prehearing Brief at 19.

32       <sup>50</sup> *Id.* See RCW 36.70A.110(2).

<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.* at 20-21 “In its [housing] analysis, the County and cities factored in the occupancy rate of single and  
      multi-family housing within the cities and their UGAs in determining population capacity, not just its apartment  
      complexes. See Ex. AS007, Appendix B, p. 13, steps 5-10.



1 “housing demand analysis” or use an apartment vacancy rate to determine overall  
2 population capacity.”<sup>53</sup>

3  
4 **Issue 4 Board’s Analysis:**

5 RCW 36.70A.070(2) requires a “housing element ensuring the vitality and character  
6 of established residential neighborhoods that: (a) Includes an inventory and analysis of  
7 existing and projected housing needs that identifies the number of housing units necessary  
8 to manage projected growth . . . .” But, Petitioners cannot satisfy their burden of proof to  
9 challenge the size and location of the Bellingham UGA based on RCW 36.70A.070(2) which  
10 applies to the Comprehensive Plan Housing Element because Petitioners failed to identify  
11 any specific language in the Housing Element that violated the standards in RCW  
12 36.70A.070(2).  
13

14 Bellingham completed and submitted its analysis to the County which “encourage[s]  
15 infill and more efficient utilization of land in existing urban areas in lieu of a higher  
16 population allocation and expanding the UGA.”<sup>54</sup> In their CP Update, the County completed  
17 a LCA using Table Six from the Whatcom County Housing Analysis, October 2015 to project  
18 housing needs by each type of housing.<sup>55</sup> The results from that analysis were used to  
19 update the County’s Housing Chapter 3. In this Chapter, the County describes the  
20 coordination with its cities:  
21

22 **Purpose**

23 The purpose of this housing element is to consider future needs for housing in  
24 Whatcom County by examining existing housing patterns, projected  
25 population growth, and most-likely growth scenarios, and to suggest realistic  
26 ways to provide for those housing needs within the wishes of county  
27 residents, sound public policy, and within the mandates of the Washington  
28 State Growth Management Act (GMA).<sup>56</sup>  
29

30 <sup>53</sup> *Id.* at 21.

31 <sup>54</sup> County’s Prehearing Brief at 20.

32 <sup>55</sup> *Id.* at Ex. AS008 (Whatcom County Housing Analysis October 2015), pp. 36-37.

<sup>56</sup> CC 1830 at Ch. 3-1.

1       **Background Summary**

2       Comprehensive plans have been developed for Whatcom County and each of  
3       the cities that lie within its boundaries. **Each of these plans contains a**  
4       **housing element that addresses the housing needs of each jurisdiction**  
5       **and offers suggestions for changes that could occur to help meet these**  
6       **needs.**

7       This chapter will overlap many of the ideas put forth in those plans—the  
8       problems perceived in each community, their changing demographics, and  
9       the directions the communities seem willing to go to improve the overall  
10       situation. It also incorporates a recent study, the *Whatcom County Housing*  
11       *Analysis 2015.*<sup>57</sup>

12       The LCA relied upon by the County includes data on population projections per city, the  
13       types of housing needed and UGA sizes needed to accommodate the population.

14       **Land Capacity:** As part of the 2016 Comprehensive Plan update, Whatcom  
15       County conducted a land capacity analysis (LCA) which **estimated each**  
16       **UGA's capacity to accommodate population and employment growth**  
17       **during the plan's 20-year planning period.** Chart 63 shows population  
18       capacity for each UGA, while Chart 64 shows the calculated capacity for  
19       dwelling units, **both single family and multi-family. Chart 65 shows the**  
20       **projected housing needs by type for each of the UGA's.** This chart is  
21       based on OFM statistics for population growth occurring by housing type  
22       between 2000 and 2013, applying the proportion of growth by housing type to  
23       the 2013-2036 growth projections. Those population projections were then  
24       divided by the household size and occupancy rate statistics used in the  
25       County's land capacity analysis, resulting in the projected need for total  
26       dwelling units by type during the planning period. Comparing Chart 65 with  
27       the estimated dwelling unit capacity in Chart 64, it appears that the planned  
28       capacity of single- and multi-family housing in the UGA's is consistent with  
29       anticipated housing needs.

30       **Implications:** It is important to address population growth impacts and  
31       housing requirements in Whatcom County over the next 20-year planning  
32       period. Comparing the planned (allocated) growth in Table 6 with the UGA  
33       population capacities in Chart 63, and comparing the supply of single- and  
34       multi-family dwellings in Chart 64 with the projected housing needs in Chart

35       

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<sup>57</sup> *Id.* at Ch.3 3-2 through 3-4.

1        **65, it appears Whatcom County's UGAs can accommodate both the**  
2        **number and types of dwellings needed in the next 20 years.** It is  
3        important to note that the projected housing needs shown in Chart 65 are  
4        based on the assumption that the 2000-2013 growth distribution among  
5        housing types will continue. That distribution may change significantly as a  
6        result of changing market conditions or jurisdictions' land use planning policy  
7        choices.<sup>58</sup> (emphasis added)

8        The Petitioners may not agree with the policy choices made by the County in regards  
9        to population projections and the size of UGAs to accommodate new residents, but the  
10       County has the discretion to do so. Here, the County completed an LCA and in response to  
11       Petitioners' claim that the County did not factor in apartment vacancy rates,<sup>59</sup> the County  
12       included occupancy rates for all dwelling units occupied vs. unoccupied as "the more  
13       appropriate statistic for calculating population capacity."<sup>60</sup> Petitioners fail to show how the  
14       County's Housing Chapter and LCA violated RCW 36.70A.070(2). **The Board finds**  
15       **Petitioners have failed to carry their burden of proof demonstrating the County failed**  
16       **to meet RCW 36.70A.070(2) requirements.**

17  
18       **Issue 6:** Do flaws in the County's land capacity analysis, including, but not limited to, failing  
19       to properly account for critical areas, failing to account for the loss of capacity in rural areas  
20       due to water restrictions, including tribal land over which neither it nor the City of Bellingham  
21       has any regulatory control, improperly including agricultural land in urban growth areas,  
22       excluding properties from the urban growth areas that would otherwise be available for  
23       development, including land in the urban growth area that is not capable of development,  
24       failing to analyze industrial lands beyond the 20-year planning horizon, and not allowing  
25       adequate peer review, violate RCW 36.70A.020(1), (2), (4), (6), (10), and/or (12), RCW  
26       36.70A.070(1), (2), and/or (3), RCW 36.70A.110, RCW 36.70A.115, RCW 36.70A.130(3)(a)  
27       and/or (3)(b), and/or WCCWPP C-1 through C-5, D-2, E-4, G-1 through G-4, G-6, and/or G-  
28       7?

29       <sup>58</sup> Whatcom County Housing Analysis at 36 <http://wa-watcomcounty.civicplus.com/DocumentCenter/View/12700>.

30       <sup>59</sup> County's Proposed Exhibit 1869 at 93 and County Prehearing Brief at 21.

31       <sup>60</sup> *Id.* at 22 "Not only is the apartment vacancy rate the wrong statistic to consider, the study that the  
32       Petitioners' figures come from is based on a survey that only included approximately 8% of all apartment units  
     in Bellingham. Proposed Ex. CC-1868 (WA Apartment Market, Spring 2016).

1 In their Prehearing Brief (pages 16-17), Petitioners allege for the first time a violation  
2 of RCW 36.70A.060(4) which provides that agricultural land located within UGAs shall not  
3 be designated as agricultural land of long-term commercial significance under  
4 RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or  
5 purchase of development rights. However, the Board cannot consider any legal argument  
6 relating to RCW 36.70A.060 because Petitioners did not raise RCW 36.70A.060 in their  
7 Petition for Review and it was not included as an issue in the Prehearing Order. Thus, the  
8 legal arguments related to RCW 36.70A.060 fall outside the scope of review in this case.  
9

10  
11 **Applicable Laws:**

12 **RCW 36.70A.110 Comprehensive plans—Urban growth areas.**

13 (1) Each county that is required or chooses to plan under RCW 36.70A.040 shall  
14 designate an urban growth area or areas within which urban growth shall be  
15 encouraged and outside of which growth can occur only if it is not urban in nature.  
16 Each city that is located in such a county shall be included within an urban growth  
17 area. An urban growth area may include more than a single city. An urban growth  
18 area may include territory that is located outside of a city only if such territory already  
19 is characterized by urban growth whether or not the urban growth area includes a  
20 city, or is adjacent to territory already characterized by urban growth, or is a  
21 designated new fully contained community as defined by RCW 36.70A.350.

22 **RCW 36.70A.115 Comprehensive plans and development regulations must  
23 provide sufficient land capacity for development.**

24 Counties and cities that are required or choose to plan under RCW 36.70A.040 shall  
25 ensure that, taken collectively, adoption of and amendments to their comprehensive  
26 plans and/or development regulations provide sufficient capacity of land suitable for  
27 development within their jurisdictions to accommodate their allocated housing and  
28 employment growth, including the accommodation of, as appropriate, the medical,  
29 governmental, educational, institutional, commercial, and industrial facilities related to  
30 such growth, as adopted in the applicable countywide planning policies and  
31 consistent with the twenty-year population forecast from the office of financial  
32 management.

1 **Positions of the Parties:**

2 Petitioners argue the County has an obligation to ensure there is sufficient land  
3 capacity for development as required in RCW 36.70A.115, but Petitioners claim “there are  
4 several flaws in the County’s development of and methodology contained in the land  
5 capacity analysis.”<sup>61</sup> Petitioners enumerate alleged flaws in the LCA: critical areas were not  
6 removed from buildable lands; water restrictions were not accounted for; tribal lands, which  
7 are not under County jurisdiction, were included in the County LCA; industrial lands were  
8 not analyzed for inclusion in the UGA.<sup>62</sup> Petitioners complain that the County excluded  
9 some properties from the UGA that could “otherwise be available for development  
10 (commonly referred to as South Yew Street and Caitac). The County has also included land  
11 in the urban growth area that is not capable of development in violation of RCW 36.70A.110  
12 and .115. In sum, Petitioners assert by including land in the UGA that is not capable of  
13 development, by excluding some land that could be developed and by failing to explain  
14 “how it came to the conclusion of the market factor” the County violated RCW 36.70A.110  
15 and.115.<sup>63</sup>

16  
17  
18 The County responds that the LCA process used to calculate net buildable areas  
19 removed critical areas, except for wetland buffers which are to be handled at the local level  
20 according to their unique circumstances.<sup>64</sup> Regarding water supplies, the County responds  
21 they relied upon current laws at the time the County adopted its CP Update, which was  
22 before the Supreme Court’s *Hirst* decision.<sup>65</sup> Tribal lands were included at the County’s  
23

24  
25 <sup>61</sup> Petitioners’ Prehearing Brief at 14-16.

26 <sup>62</sup> *Id.* at 16.

27 <sup>63</sup> *Id.* at 19-20.

28 <sup>64</sup> County’s Prehearing Brief at 22-23 “The County and the cities, however, did not deduct wetland buffers from  
29 these residential lands “due to the variety of clustering and density transfer options available on these parcels.”  
30 Ex. AS007, Appendix B, p. 5. As an added safeguard, the methodology provided that “[l]ater in the local  
31 jurisdiction review process, adjustments to critical area deductions can be made for cases with unique  
32 circumstances.”

<sup>65</sup> *Id.* at 25 “At the time of the adoption of the challenged ordinance, existing law supported the County’s plan  
and the County had no reason to consider any loss of development capacity in the rural areas. The County  
cannot be held responsible for not taking into account a decision that did not exist at the time it acted.”  
*Whatcom Cty. v. W. Wash. Growth Mgmt. Hr’gs Bd.*, 186 Wash. 2d 648, 381 P.3d 1 (2016).

1 discretion<sup>66</sup> and industrial lands were analyzed at Cherry Point which reconciles their CPPs  
2 and GMA provisions.<sup>67</sup> For agricultural lands, the County explained the difference between  
3 “zoned” agricultural properties within the UGA and those “designated” as agricultural lands  
4 outside UGA.

5  
6 **Issue 6 Board Analysis:**

7       Petitioners claim RCW 36.70A.115 requirements were not followed by the County  
8 when it completed the LCA<sup>68</sup> and GMA requirements were not followed when the County  
9 failed to explain how it arrived at its market factor.<sup>69</sup> RCW 36.70A.115 requires a County to  
10 “provide sufficient capacity of land suitable for development ...consistent with the twenty-  
11 year population forecast from the office of financial management.” The Board does not find  
12 Petitioners’ arguments compelling.

13  
14       The evidence in the record demonstrates the County completed a LCA which  
15 included an explanation of how it has or will subtract critical areas, including wetlands, in  
16 each jurisdiction depending on the jurisdictions’ critical areas ordinances and clustering  
17 provisions.<sup>70</sup> Petitioners claim that the County should have complied with the requirements  
18 of *Hirst* to adopt measures in the rural and land use elements that protect the quality and  
19 quantity of surface and groundwater resources cannot be considered in this case because  
20 Petitioners failed to raise this issue in their Petition for Review. As for Tribal Lands, the  
21  
22

23  
24 <sup>66</sup> *Id.* at 26 “The fact that neither the cities nor the County have control over the zoning in this area does not  
25 negate the potential for this land to provide a significant number of jobs to the local population. If the County  
26 ignored this information and included additional different land for commercial development in the UGA, it would  
27 be arguably oversizing its UGAs in violation of the GMA. As mentioned previously, the County has wide  
28 discretion in making choices regarding deductions to buildable land. Including the tribal land and recognizing  
29 its known potential for commercial development was certainly within the County’s discretion.”

30 <sup>67</sup> *Id.* at 29 “Petitioners fail to cite to any authority in the GMA requiring the County to have a supply of  
31 industrial land designations beyond the 20-year planning period.... There is a degree of tension between the  
32 GMA provisions requiring a 20-year land supply to accommodate urban growth and the County-wide Planning  
Policy, which calls for land designations to accommodate industrial growth beyond the 20-year planning  
period. The County is addressing this situation with the following approach.”

<sup>68</sup> Petitioners’ Prehearing Brief at 14-19.

<sup>69</sup> *Id.* at 20.

<sup>70</sup> AS007 Whatcom County Land Capacity Analysis, Detailed Methodology (September 18, 2015) at 4.

1 Board agrees with the County that it must consider large Tribal land developments to have a  
2 realistic assessment of appropriate size for UGAs; without including the Tribal lands the  
3 County is at risk of oversizing its UGAs and has discretion to include such lands.<sup>71</sup> And as  
4 the Board had found in other cases, local circumstances must be considered when sizing  
5 UGAs:

6 Local Circumstances

7 At the outset, the Board understands the land capacity analysis is intended to  
8 provide the information needed to right-size the UGA to accommodate a  
9 projected population. As the GMA Guidelines explain:

10 *The land capacity analysis is a comparison between the collective effects of*  
11 *all development regulations operating on development and the assumed*  
12 *densities established in the land use element.*<sup>72</sup>

13 Thus, to determine future development capacity, the Guidelines advise  
14 looking not solely to the minimum density in each zone, but to the “collective  
15 effect of all development regulations.” **As the Board sees it, this**  
16 **underscores the Court’s insistence on a review of local circumstances –**  
**what is actually happening on the ground.**<sup>73</sup> (Emphasis added)

17 In regards to the County’s market factor analysis, the Board notes that the County  
18 explains how it selected and applied a market factor analysis for each city in the County.<sup>74</sup>  
19 The County has shown that its work in the June 27, 2016, LCA was not unreasonable based  
20 on the facts in the record. That is the only showing required of it under the GMA.<sup>75</sup>

21 The Board is not persuaded by Petitioners’ arguments that the County’s LCA is  
22 flawed. Petitioners have not demonstrated that the County failed to provide sufficient  
23

24  
25 <sup>71</sup> RCW 36.70A.3201; *Quadrant Corporation v. State Growth Management Hearings Board*, 154 Wn.2d 224,  
238, 110 P.3d.1132 (2005).

26 <sup>72</sup> WAC 365-196-325(2)(a). The GMA guidelines are not mandatory for cities and counties. RCW  
27 36.70A.190(4)(b). However, the Board is required to consider the guidelines when it makes a determination  
concerning GMA compliance. RCW 36.70A.320(3).

28 <sup>73</sup> *Suquamish II (Remand) v. Kitsap County, GMHB No. 07-3-0019c* (Final Decision and Order on Remand,  
29 August 31, 2011) at 55-56.

30 <sup>74</sup> AS007 Land Capacity Analysis Report (June 27, 2016) at 5-6.

31 <sup>75</sup> *Thurston County v. W. Wash. GMHB*, 164 Wn.2d 329, at 353. Note that an additional review and evaluation  
32 program in addition to the requirements of RCW 36.70A.110, 36.70A.130 and 36.70A.210 is provided for  
certain counties west of the Cascades (Clark, King, Kitsap, Pierce, Snohomish, and Thurston) RCW 36A.215.  
That section does not apply to Whatcom County.

1 capacity of land suitable for development to accommodate allocated housing and  
2 employment growth consistent with the OFM twenty-year population forecast. **The Board**  
3 **finds and concludes Petitioners did not carry their burden of proof demonstrating the**  
4 **County failed to meet requirements in RCW 36.70A.110 or RCW 36.70A.115.<sup>76</sup>**  
5

6 **Issue 7:** Does excluding an area from an urban growth area that has urban characteristics  
7 and is contiguous to a city violate RCW 36.70A.020(1), (2), (6), and/or (12), RCW  
8 36.70A.110, and/or WCCWPP B-2, C-1, C-2, C-5, D-2, D-4, and/or D-5?

9 **Applicable Law:**

10 **RCW 36.70A.110 Comprehensive plans—Urban growth areas.**

11 (2) Based upon the growth management population projection made for the county  
12 by the office of financial management, the county and each city within the county  
13 shall include areas and densities sufficient to permit the urban growth that is  
14 projected to occur in the county or city for the succeeding twenty-year period . . .

15 (3) Urban growth should be located first in areas already characterized by urban  
16 growth that have adequate existing public facility and service capacities to serve such  
17 development, second in areas already characterized by urban growth that will be  
18 served adequately by a combination of both existing public facilities and services and  
19 any additional needed public facilities and services that are provided by either public  
20 or private sources, and third in the remaining portions of the urban growth areas.  
Urban growth may also be located in designated new fully contained communities as  
defined by RCW 36.70A.350.

21 **Positions of the Parties:**

22 Petitioners argue their properties should have been included in the Bellingham UGA  
23 because:

24 The South Yew Street area was previously included in the Bellingham UGA. It  
25 is characterized by urban development – approximately 520 acres with  
26 approximately 485 dwelling units developed using City of Bellingham  
27 standards.<sup>77</sup>

31 <sup>76</sup> *Robert Strahm v. Snohomish County*, GMHB No. 15-3-0004 (January 19, 2016).

32 <sup>77</sup> Petitioners Brief at 21 and Index # CC-409, RES004, p. 14-15.



1 The entire Caitac property (not just the southern portion) was included in the  
2 planning calculations for the City of Bellingham's 2009 water and sewer  
3 plan.<sup>78</sup>

4 Petitioners explain their properties, South Yew Street and South Caitac, are areas  
5 characterized by urban development and "meet the requirements set forth in RCW  
6 36.70A.110(3) as they already have urban characteristics, and are adjacent to the  
7 Bellingham UGA."<sup>79</sup> Both County and Bellingham planning commissions recommended  
8 these sites be included in the Bellingham UGA, but Petitioners argue their  
9 recommendations were not heeded by the County Council.<sup>80</sup> Petitioners complain the  
10 County did not properly calculate costs to include the properties and the cost "associated  
11 with inclusion of the South Yew Street and Caitac property was greatly inflated and  
12 exaggerated by the County and City."<sup>81</sup>

14 The County responds by explaining the Board does not have authority to decide  
15 locations of UGAs and the Board only has "authority to determine whether the County  
16 properly exercised its discretion in establishing UGAs that are sufficiently sized to  
17 accommodate urban growth during the 20 year-planning period... [t]he County has  
18 discretion to determine how it will channel growth so long as those decisions comply with  
19 the GMA."<sup>82</sup> Also, it was appropriate for the city and county, under WAC 365-196-310(4)(a),  
20 "in selecting growth forecasts... should "carefully consider" the public facilities and service  
21 implications, "particularly when considering forecasts closer to the high end of the range."<sup>83</sup>  
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28 <sup>78</sup> *Id.* at 22 and Index # CC-1179.

29 <sup>79</sup> *Id.* at 22 and Index # C304, CC-409, CC-1179, RES004, p. 14-15.

30 <sup>80</sup> *Id.* at 21.

31 <sup>81</sup> *Id.* at 23 and Index # CC-409.

32 <sup>82</sup> County Prehearing Brief at 32. See *Klein v. San Juan County, WWGMHB No. 02-2-0008 (FDO, October 15, 2002)* and *Manke Lumber Co. v. Hearings Bd.*, 113 Wn. App. 615, 630-31 (2002),

<sup>83</sup> *Id.* at 33.

1 In sum, the County concludes it had discretion to “choose the population allocation it did for  
2 Bellingham and the LCA shows that the current UGA has ample capacity to accommodate  
3 that growth over the next 20 years.”<sup>84</sup>  
4

5 **Issue 7 Board’s Analysis:**

6 Petitioners arguments are not persuasive that the County violated RCW 36.70A.110  
7 when it chose not to include two properties in the UGAs and it chose not to extend capital  
8 facilities to areas that were previously in a UGA. The Board’s role is to determine whether  
9 the County met RCW 36.70A.110 requirements about sizing UGAs and locating urban  
10 growth boundaries, not to second-guess the discretion exercised by the County absent a  
11 showing that the action was clearly erroneous.  
12

13 (3) Urban growth should be located first in areas already characterized by  
14 urban growth that have adequate existing public facility and service capacities  
15 to serve such development, second in areas already characterized by urban  
16 growth that will be served adequately by a combination of both existing public  
17 facilities and services and any additional needed public facilities and services  
18 that are provided by either public or private sources, and third in the  
remaining portions of the urban growth areas.

19 Here, the County chose not to enlarge the UGA for the City of Bellingham. As the  
20 legislature, the Supreme Court and this Board have previously ruled, local governments  
21 have discretion to make choices such as when and where to designate UGA.<sup>85</sup>  
22

23 The legislature intended to grant counties deference in “how [they] *plan*[ ] *for*  
24 *growth*,” *Cooper Point Ass’n*, 148 Wn.2d at 14 (emphasis added), and to hold  
25 otherwise would lead to a construction inconsistent with the legislature’s  
26 intent.<sup>86</sup>  
27

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28 <sup>84</sup> *Id.*

29 <sup>85</sup> RCW 36.70A.3201. The legislature intends that the board applies a more deferential standard of review to  
30 actions of counties and cities than the preponderance of the evidence standard provided for under existing  
31 law. In recognition of the **broad range of discretion that may be exercised by counties and cities**  
consistent with the requirements of this chapter, the legislature intends for the board to grant deference to  
32 counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.

<sup>86</sup> *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005) at 240.

1 From this statute, the Board finds that it is within a county's discretion to  
2 determine UGA boundaries. It is not within cities' discretion to determine  
3 UGA boundaries. This is a fundamental principle in the GMA and as planning  
4 partners...<sup>87</sup>

5 All changes in the size and boundaries of a UGA must correspond to the calculated  
6 need to accommodate OFM-projected housing and employment growth. If a County  
7 determines, in consultation with the City, that it needs to enlarge a UGA to accommodate  
8 OFM-projected growth, then the locational criteria in RCW 36.70A.110(3) will dictate which  
9 lands will be included in the enlarged UGA. Just because land located next to a UGA  
10 boundary is arguably "characterized by urban growth" does not *ipso facto* create any duty  
11 for the County to expand the UGA at that location. The predicate to any UGA enlargement  
12 is the unmet need to accommodate OFM-projected growth. Here, Petitioners did not adduce  
13 any evidence demonstrating that in reviewing the size of the Bellingham UGA for this  
14 update cycle, the County failed to accommodate OFM-projected growth over the 20-year  
15 planning horizon.  
16

17 **The Board finds and concludes Petitioners failed to carry their burden of proof**  
18 **demonstrating the County failed to comply with RCW 36.70A.110(3).**  
19

20 **Issue 8:** Does the County's inability to allow urban development within its urban growth  
21 areas as projected to occur during the established 20-year planning horizon (from 1997-  
22 2017), by, among other things, failing to include adequate zoning and densities, failing to  
23 provide enough buildable lands, and failing to provide urban services (as the same is  
24 defined at RCW 36.70A.030(18)), violate RCW 36.70A.020(1), (2), (6), and/or (12), RCW  
25 36.70A.110, RCW 36.70A.130(3)(b), and/or WCCWPP B-2, C-1, C-2, C-3b, C-5, D-5, E-4,  
26 F-3, and/or F-4?

27 **Applicable Laws:**

28 **RCW 36.70A.020(1) Planning goals**

29 The following goals are adopted to guide the development and adoption of  
30 comprehensive plans and development regulations of those counties and cities that  
31 are required or choose to plan under RCW 36.70A.040. The following goals are not

32 <sup>87</sup> *City of Oak Harbor v. Island County*, GMHB No. 11-2-0005 (FDO, December 12, 2011) at 20.

1 listed in order of priority and shall be used exclusively for the purpose of guiding the  
2 development of comprehensive plans and development regulations:

3 (1) Urban growth. Encourage development in urban areas where adequate public  
4 facilities and services exist or can be provided in an efficient manner.

5 **Positions of the Parties:**

6 Petitioners cite RCW 36.70A.020(1) for the proposition that the GMA encourages  
7 development in “urban areas where adequate public facilities and services exist or can be  
8 provided in an efficient manner”<sup>88</sup> and that providing those services “...is true for UGAs that  
9 are within as well as outside of city limits.”<sup>89</sup> Petitioners argue that existing deficiencies  
10 “have not been corrected or been made available within the 20-year planning horizon and  
11 there is no anticipated action to correct these deficiencies, concluding that the County is  
12 required to “ensure that capital facilities are available in the urban growth areas during the  
13 20-year planning horizon.”<sup>90</sup>

14  
15 The County’s response in both the brief and at the hearing emphasized that “there is  
16 nothing in the GMA or the cases that interpret it requiring the County to ensure that capital  
17 facilities are actually physically in place during the initial 20-year planning period.”<sup>91</sup> Further,  
18 the County points out Petitioners did not cite a specific provision in Ordinance 2016-034  
19 which they claim violate the GMA, but instead “Petitioners appear to be making an untimely  
20 and improper challenge to the County’s long-standing regulations that require public water  
21  
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25 <sup>88</sup> Petitioners Brief at 24 See *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB No. 03-2-  
0010 (FDO, May 31, 2005), p. 9.

26 <sup>89</sup> *Id.* See *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB No. 07-2-0012c, Compliance  
27 Order (August 12, 2009), p. 4. (“[M]aking capital facilities such as a treatment plant, trunk lines, and pump  
stations *available* within the 20-year planning horizon is sufficient.”)

28 <sup>90</sup> Petitioners Brief at 24 and Index # CC-69 (showing deficiencies in the LCA methodology), CC-74, p.6 (“The  
29 fact is most of the existing un-built lands within the City and its UGA remain un-built for a good reason. Factors  
30 such as geographic isolation due to proximity to wetlands, buffers and steep slopes, fragmented ownership,  
and many other limitations all combine to render most of these vacant lands unbuildable for any meaningful  
31 densities.”)

32 <sup>91</sup> County Prehearing Brief at 34.

1 and sewer prior to being able to develop at urban densities within UGAs and a City of  
2 Bellingham ordinance that limits the extension of urban services prior to annexation.”<sup>92</sup>

3  
4 **Issue 8 Board Analysis:**

5 Here, the Petitioners’ argument assumes that a GMA planning goal alone can be  
6 violated, without identification of the other requirements laid out in the GMA that support  
7 those goals. If Petitioners claim “the County is required to ensure that capital facilities are  
8 available in the urban growth areas during the 20-year planning horizon” as a requirement  
9 for meeting this goal, then they must show a *substantive violation of another GMA*  
10 *requirement* for the comprehensive plan.<sup>93</sup> They have not done so.

11  
12 We note that Petitioners failed to brief any of the other alleged violations set out in  
13 the issue statement, arguing only the violation of the RCW 36.70A.020(1). Previous Board  
14 decisions have noted jurisdictions are required to consider the GMA’s goals so as to guide  
15 the development of comprehensive plans and related development regulations although  
16 nothing in the GMA requires a specific written delineation of such consideration.<sup>94</sup>

17  
18 Specifically related to Whatcom County, the Board has ruled that “to evaluate  
19 whether or not the County complied with GMA goals, the Board needs to consider how the  
20 County complied with GMA requirements that support these goals.”<sup>95</sup> As noted above,  
21 Petitioners’ brief identified no GMA requirements violated by the County to support their  
22 assertion that the County is not in compliance with the goal statement alone. And  
23 Petitioners did not demonstrate that the CP was not guided by GMA Planning Goal 1, which  
24 is to “[e]ncourage development in urban areas where adequate public facilities and services  
25 exist or can be provided in an efficient manner.”  
26

27  
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29 \_\_\_\_\_  
30 <sup>92</sup> *Id.*

31 <sup>93</sup> Petitioners Prehearing Brief at 24-25.

32 <sup>94</sup> *Weyerhaeuser et.al. v. Thurston County*, GMHB No. 10-2-0020c (June 17, 2011) at 52. *Petree, et al v. Whatcom County*, WWGMHB No. 08-2-0021c (October 13, 2008).

<sup>95</sup> *Petree, et al v. Whatcom County*, WWGMHB No. 08-2-0021c (FDO, October 13, 2008) at 39.

**The Board finds and concludes Petitioners failed to carry their burden of proof demonstrating the County failed to comply with RCW 36.70A.020(1).**

## VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board finds Petitioners failed to carry their burden of proof demonstrating Whatcom County's adoption of Ordinance 2016-034 was clearly erroneous and failed to prove any violations of GMA requirements. **This case is closed.**

SO ORDERED this 7th day of April, 2017.

**Nina Carter, Board Member**

Raymond L. Paolella, Board Member

Deb Eddy, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>96</sup>**

<sup>96</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.

A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

## Appendix A: Procedural matters

On October 11, 2016, Whatcom County Association of Realtors, Building Industry Association of Whatcom County, Whatcom Affordable Housing Group, South Yew Street Group, Citizens' Alliance for Property Rights, and Whatcom Business Alliance (Petitioners) filed a petition for review. The petition was assigned Case No. 16-2-0007.

A prehearing conference was held telephonically on November 16, 2017. Petitioners appeared through its counsel Bradley Swanson. Respondent Whatcom County appeared through its attorney Karen Frakes. Intervenor City of Bellingham was represented by its attorney, Alan Marriner. On November 9, 2016, City of Bellingham filed a Motion to Intervene. No objections were made by Petitioners or Respondent at the prehearing conference.

The Board issued an Order on Motions<sup>97</sup> in response to Petitioners' addition to the index<sup>98</sup> and two motions filed by the parties.<sup>99</sup>

On December 19, 2016, a Notice of Change of Case Panel was issued to notify the parties of the change of case panel due to the retirement of Chuck Mosher. Raymond Paolella was assigned as the third panelist.

The hearing date was rescheduled to March 8, 2017, due to a conflict in the Board's schedule.<sup>100</sup>

The County/City filed a Joint Motion to Supplement the Record; the Board granted the motion/request.<sup>101</sup>

The Briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Petitioners' Prehearing Brief, January 11, 2017 (Petitioner's Brief);

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<sup>97</sup> December 22, 2016.

<sup>98</sup> Petitioners' Additions to the Index of Record (December 2, 2016).

<sup>99</sup> Whatcom County/City of Bellingham Joint Dispositive Motions (December 7, 2016). Petitioners' Motion to Supplement the Record (December 7, 2016).

<sup>100</sup> Order Changing Date of the Hearing on the Merits (January 25, 2017).

<sup>101</sup> Order on Joint Motion to Supplement the Record/Request for Official Notice (February 17, 2017).

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- Prehearing Brief of Respondent Whatcom County and Intervenor City of Bellingham, February 1, 2017 (Response Brief);
- Petitioners' Reply to Prehearing Brief of Respondent Whatcom County and Intervenor City of Bellingham, February 15, 2017 (Reply Brief).